

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Orig. w/ affidavit of mailing

74-8413

75-1068

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-8413

UNITED STATES OF AMERICA,

Appellee.

—against—

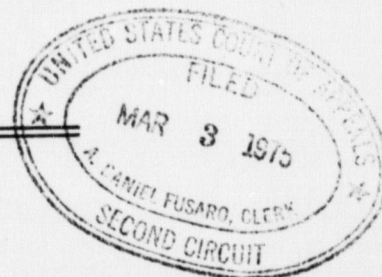
MOZELLE WILLIAMS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.



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2 were.

3 Q From where?

4 A I could see the plane from where I was standing
5 and the first time I saw him he was down near the plane,
6 halfway down the ramp about 30 yards it looked to me -- 20
7 yards, anyway.

8 Q Was it your testimony --

9 MR. LEVIN-EPSTEIN: Withdrawn.

10 I have no further questions of the witness, your
11 Honor.

12 MR. WYATT: I have nothing further.

13 THE COURT: You may step down.

14 MR. WYATT: The defendant rests, your Honor.

15 THE COURT: Will there be anything further?

16 MR. LEVIN-EPSTEIN: I have no further actual
17 evidence to offer at this time on the motion to
18 suppress.

19 The Government still rests on the motion.

20 MR. WYATT: And the defense rests and is ready
21 for argument.

22 THE COURT: Now, it is obvious there is a
23 conflict in testimony which has to be resolved.

24 Does this tape you have there help to resolve
25 it?

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2 MR. LEVIN-EPSTEIN: I don't believe so.

3 MR. WYATT: I don't believe so.

4 THE COURT: You have both listened to it?

5 MR. WYATT: We have both listened to it.

6 MR. LEVIN-EPSTEIN: As to that issue alone.

7 MR. WYATT: Yes.

8 THE COURT: Yes, I understand.

9 MR. WYATT: On the suppression motion we agree
10 it would not assist the Court in any significant way
11 at all.

12 MR. LEVIN-EPSTEIN: That is correct, your Honor.

13 THE COURT: Well, I think what I'd better do
14 here is take a recess until about 3:45 which will give
15 me an opportunity -- unless there is a special problem
16 that stands in the way -- that will give me an oppor-
17 tunity to review my notes.

18 Do you have any citations you wish to call
19 the Court's attention to?

20 MR. LEVIN-EPSTEIN: Yes.

21 I would have cited to the Court, in a memorandum
22 of law, had I prepared one, the Albarado case; U.S.
23 v. Lopez, 328 Fed Supp. 1077, a 1971 case, Eastern
24 District of New York, Judge Weinstein's opinion and
25 the case of U.S. v. Bell, Henry Bell, decided by the

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1 Second Circuit on July 5, 1972. I don't have the
2 citation --

3 THE COURT: I think that is cited in the
4 Albarado case.

5 MR. LEVIN-EPSTEIN: I believe so.

6 MR. WYATT: It is.

7 THE COURT: Mr. Wyatt, did you mention a third
8 case? You have Ruiz Estrella and the Melnur case of
9 Judge Fergurson --

10 MR. WYATT: I have additional cases to cite
11 to the Court.

12 The language of U.S. v. Davis --

13 THE COURT: What is the cite on that?

14 MR. WYATT: I will give it to you in just a
15 second.

16 (Pause.)

17 MR. WYATT: I have Davis here in front of me,
18 482 Fed 2d 893. It is a 1973 case, a very famous case.
19 It is one of the leading cases in the whole field we
20 are dealing with and I would also cite to the Court
21 Schneckloth v. Bustamonte, a United States Supreme
22 Court case.

23 THE COURT: I am familiar with that one.

24 MR. WYATT: I would also cite to the Court
25 Chimel v. The United States with respect to the extent --

1 THE COURT: Yes.

2 MR. WYATT: Also, U.S. v. Kroll, 481 Fed 2d
3 844 and more particularly, the language at 886.

4 I would also cite to the Court the language and
5 the reasoning of U.S. v. Legato, 480 Fed 2d 408 and
6 I would ask your Honor to read the language of the
7 footnote at page 410, particularly the language
8 that related to that footnote at 410 dealing with
9 some statement made by Legato's co-conspirator and I
10 would ask the Court to look at the results of that
11 case and I would place substantial emphasis on Ruiz-
12 Estrella, partly because I think the Court may be
13 remember the facts in that case better than some and
14 I think that Melnur -- the language that Judge Fergusson
15 uses -- it is out in our district in California --
16 I think the language is very persuasive and the
17 language he uses in dealing with one of the points --
18 351 Fed. Supp. 1284 and I am particularly impressed
19 with Cipres v. United States because I argued that case
20 and I think they are right and it deals with the
21 question of consent and it should be helpful, parti-
22 cularly when read in light of the Supreme Court case
23 of 1973. That is Ramona Cipres.

24 THE COURT: I thought I saw that here --

25 MR. WYATT: Cipres was cited in Estrella, as a

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1 matter of fact -- 343 Fed. 2d 95 and particularly, the
2 language at page 97 because it is at that point that
3 the Court of Appeals deals with what Judge Westover
4 should have done when weighing the question of whether
5 or not there has been a voluntary granting of consent
6 and the language is awfully persuasive there.

7 THE COURT: Well, let me reflect on the situation.

8 MR. WYATT: Thank you, your Honor.

9 345 your Honor said?

10 THE COURT: Yes.

11 (Recess taken.)

12 (Continued on next page.)
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1 THE COURT: Before I invite counsel to
2 present some argument in this matter I have come
3 to the conclusion that there are some gaps in the
4 testimony here that may possibly be cured. I am
5 not sure.

6 First, let me inquire whether there would
7 be any dispute that the defendant in fact met the
8 profile. Would there be any dispute on that score?

9 MR. WYATT: No serious dispute about that,
10 no.

11 THE COURT: All right.

12 So, it would be agreed that it is not
13 necessary to produce another witness to testify to
14 that.

15 MR. WYATT: That's right.

16 THE COURT: Now, there is some ambiguity
17 with respect to the magnetometer and my notes indi-
18 cate that it was the recollection of then Deputy
19 Marshall Feltick that the defendant went through
20 the magnetometer twice and was carrying the bag
21 each time. Is there any disagreement with that
22 statement of fact?

23 MR. WYATT: That that is what his testimony
24 was?

25 THE COURT: That that is what his testimony

1 was.

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2 MR. WYATT: I believe that is what he said
3 but there is an ambiguity on that -- there is a con-
4 flict.

5 THE COURT: Does that appear in the report?
6 I haven't had the benefit of the report.

7 MR. WYATT: No, but I believe that is what he
8 said.

9 THE COURT: This was on cross-examination
10 and you asked him whether he was told that or it
11 came from his recollection --

12 MR. WYATT: That is correct and he said that
13 he arrived there when Mr. Williams was sent through
14 the second time and that he had the bag. That is
15 the understanding I had of the testimony.

16 THE COURT: The marshal is shaking his head --

17 MR. LEVIN-EPSTEIN: I dispute that recollection
18 myself.

19 Officer Huttick will take the stand again to
20 clear up any ambiguity.

21 THE COURT: Well, what bothers me is that
22 whether the information about having gone through
23 the magnetometer twice, each time carrying the bag,
24 is hearsay or the marshal's own recollection.

25 MR. LEVIN-EPSTEIN: I would be willing to call

1 the police officer -- then marshal -- again, although
2 I believe the record will speak clearly to the
3 point.

4 THE COURT: Well, let me put this question
5 to Mr. Wyatt before we reach a decision as to whether
6 it is necessary for the marshal to respond to the
7 question I posed.

8 MR. LEVIN-EPSTEIN: Very well, sir.

9 THE COURT: There is no question that the
10 defendant testified that he went through the magnet-
11 ometer three times.

12 MR. LEVIN-EPSTEIN: That is correct.

13 THE COURT: Once with the bag and twice with-
14 out it.

15 MR. WYATT: Yes.

16 THE COURT: Without imposing any obligation
17 upon the defendant and it is not my intention to do
18 that -- I am simply trying to establish some facts
19 and perhaps get to the truth but at the same time
20 I recognize that the burden is on the government
21 to establish the legality of the search.

22 Did the defendant, the first time he went
23 through the magnetometer, observe any activity on
24 the part of the magnetometer and you may consult
25 with him.

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1 MR. WYATT: He testified he did not.

2 THE COURT: He did not. He was unaware.

3 MR. WYATT: That is correct. That was brought
4 out on cross-examination.

5 THE COURT: Of course, my notes are not the
6 record in the case and I couldn't find a reference
7 to that --

8 MR. LEVIN-EPSTEIN: I would commend the
9 record to the Court's attention as clearing up these
10 questions although if it would be more convenient
11 and without objection from counsel, I am perfectly
12 willing to call the witness again -- my witness.

13 THE COURT: Well, would it be the marshal's
14 testimony that on the second pass through with the
15 bag the marshal can say, to his own recollection,
16 that the magnetometer was activated the second time?

17 MR. LEVIN-EPSTEIN: If you are talking about
18 the time that the marshal testified -- the second
19 time -- in other words, when Mr. Williams passed
20 through the magnetometer with the bag --

21 THE COURT: Well, let me see if I understand
22 correctly.

23 The marshal had spoken about two pass throughs --

24 MR. LEVIN-EPSTEIN: Correct.

25 THE COURT: I take it the marshal was not

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present the first time this occurred?

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MR. LEVIN-EPSTEIN: The marshal was present both times.

THE COURT: Both times?

MR. LEVIN-EPSTEIN: Yes, according to the testimony and his recollection.

THE COURT: And he did observe the magnetometer activated both times?

MR. LEVIN-EPSTEIN: I am informed, as he said on the stand, that he observed the reading on the magnetometer both times.

MR. WYATT: If this is a critical question, your Honor, I would ask leave of the Court to examine Officer Huttick further on that, particularly in relation to his report that he apparently wrote on that date.

MR. LEVIN-EPSTEIN: Counsel had ample opportunity to cross-examine on the report and took advantage of the opportunity and took advantage to cross-examine Officer Huttick on his entire testimony.

THE COURT: Well, on the other hand, as a result of the discussions with the Court it must be apparent that the Court is attaching some significance

MR. LEVIN-EPSTEIN: Obviously and if the Court -- I am sorry. I interrupted.

1 THE COURT: (Continuing.) And I wouldn't
2 say that counsel would have been aware of that until
3 the Court indicated it.

4 MR. LEVIN-EPSTEIN: Then the government has
5 no objection to the Court propounding certain
6 questions to the witness but I feel the time for
7 cross-examination is over.

8 It is certainly not the government's intention
9 to hold any further enlightenment from the Court on
10 these matters but with respect to the adversary
11 procedure to be followed, fairness and frankly,
12 justice in this case, to both the defendant and the
13 government, I don't think would be served by the
14 witness being subjected to leading questions other
15 than those that may be propounded by the Court --
16 no more I might add, your Honor, than if a jury
17 were here and came back a period of time after being
18 sworn and sent to deliberate, would they be entitled
19 to hear anything except what the record was.

20 THE COURT: Well, we are not dealing with a
21 jury situation.

22 MR. LEVIN-EPSTEIN: That is exactly why I
23 suggest that the Court may satisfy the ambiguity
24 here by propounding its own questions to the witness
25 or witnesses, for that matter.

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1 7 The government is satisfied that the record
2 is clear enough upon appraisal by all parties, to
3 satisfy these ambiguities.

4 MR. WYATT: Of course, the position of the
5 defense is that if the ambiguity were not there the
6 Court would not raise it.

7 THE COURT: Well, I think in the light of
8 the response to the Court's question here it does
9 not appear that a useful purpose would be served
10 by further testimony or cross-examination so I will
11 permit the government to address the Court first
12 on whether it believes the meeting of the profile
13 is considered by the government to be a significant
14 element in this case.

15 (Continued next page.)
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MR. LEVIN-EPSTEIN: Oh, yes, your Honor.

The fact is, as you will note, that there is not dispute as to the point of whether or not Mr. Williams met the profile -- whether or not it is significant.

The attention of the ticket agent would never have been brought to bear on Mr. Williams had he not matched the profile and the profile is well accepted in this Circuit and others and certainly in 1971 was accepted as a substantial criterion to determine whether or not the person meeting the profile also posited a risk such that further action and inquiry should be taken and in this case there is a classic meeting of the profile; a man travelling alone, paying cash for the ticket, unable to identify himself except for the ticket, passed through the magnetometer and trips the magnetometer. I cannot think of a situation, your Honor, where the profile could be more satisfied than this one.

To answer the Court's question, of course the profile is significant as to whether or not there has been a proper procedure here.

THE COURT: In other words, it's the government's position that that is one of the elements of probable cause for a search --

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1 MR. LEVIN-EPSTEIN: Under these circumstances --

2 THE COURT: -- probable cause for a search
3 which in the totality of the circumstances would be
4 a reasonable cause within the meaning of the fourth
5 amendment and the cases dealing with this peculiar
6 problem, it seems, of airport searches.

7 MR. LEVIN-EPSTEIN: That's right.

8 Obviously, had there been probable cause to
9 arrest the defendant merely on the fact that he
10 matched the profile and the Court had hypothetically
11 found that from time out of mind, there would have
12 been no suppression hearing. There would have been
13 probable cause to arrest merely on the basis of the
14 profile.

15 The arrest was made on the discovery of the
16 contraband but the search leading to the contra=
17 band -- and I might point out that it is analogous
18 in Terry v. Ohio, a landmark decision in the stop
19 and frisk area is exactly what we are concerned with
20 here.

21 Mr. Williams had certain factors which he
22 presented to the objective eye of the United States
23 Marshal. One, he matched the profile and above and
24 beyond that he didn't, he couldn't, by his own
25 testimony identify himself when requested to.

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1 Now, based upon this and not necessarily
2 based solely upon any consent -- for the government
3 posit to the Court that even if Mr. Wyatt has proven
4 -- though he has no burden to prove that there was
5 no consent -- the government's position would still
6 be such that the search should have been upheld or
7 should be upheld, rather.

8 The government does submit that even con-
9 sidering Mr. Williams' testimony on the stand here,
10 which is obviously in direct contradiction to
11 Officer Huttick's testimony, there were three factors
12 to be considered by the Court in this unique
13 situation of the airport search; one, he matched the
14 profile -- there is no doubt about that -- secondly,
15 he could not identify himself and in light of
16 cases such as Lopez, the opinion in Lopez by Judge
17 Weinstein and others following, including Bell,
18 particularly Judge Friendly's concurring opinion,
19 there is no question about that being a significant
20 factor and thirdly, we are talking about the unusual
21 circumstance of a very vast national interest com-
22 pelling a balance in light of cases like Terry
23 against Ohio.

24 We are talking here about a situation where
25 the United States Marshal was out at the airport for

1 one specific purpose: A 16 To prevent unbelievably tragic
2 circumstances from happening. It has been held
3 again and again by this Circuit and others that
4 the importance, the national interest involved in
5 these kinds of searches is so compelling that the
6 normal standard of probable cause that might be
7 expected in say Mapp v. Ohio is not necessary to
8 be fulfilled.

9 In that, the Terry standard of a reasonable
10 suspicion based upon a totality of the circumstances
11 is much more appropriate. In fact, that has been
12 held by this Circuit and I submit to the Court,
13 others.

14 Based on these three factors including the
15 factor that the government posit to the Court --
16 that there was an implied consent -- based upon
17 the impression given to Officer Huttick as a reason-
18 able objective police officer under the circum-
19 stances and not withstanding the contrary testimony
20 of Mr. Williams in Court, these four factors, even
21 if the Court were to discern the factor of consent,
22 the case does not fall for in fact the three other
23 remaining factors are sufficient to substantiate
24 the government's position that it was a lawful search
25 under the fourth amendment.

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1 THE COURT: Mr. Wyatt?

2 MR. WYATT: Rather than elucidate the whole
3 myriad of arguments that I will bring before the
4 Court, I will direct my attention to the question
5 that the Court raised.

6 The question raised is by meeting the profile,
7 does this satisfy the condition of probable cause to
8 give rise to the exercise of government power to
9 search a person.

10 This question is answered for us several
11 different times in several different cases, not the
12 least of which is the Supreme Court and it is cited
13 in Ruiz-Estrella.

14 The one distinguishing set of facts here and
15 in Estrella is that there was no magnetometer.

16 However, I would submit to the Court that
17 no additional stature is added to the magnitude of
18 the evidence nor the information in the mind of
19 this officer at the time this search is made.

20 In Ruiz-Estrella, the Court specifically and
21 emphatically said that under no circumstances can
22 probable cause be arrived at by virtue of the fact
23 that Ruiz-Estrella met the profile, nor did the
24 government claim that, as a matter of fact.

25 It is ironic that now the government takes a

1 different kind of position.

2 What the Court said in Ruiz-Estrella and this
3 was one of the findings that your Honor made in that
4 case, was that not only was there the profile but
5 furtive movement, unusual circumstances surrounding
6 Ruiz-Estrella, coming into the airport and this was
7 one of the factors influencing this Court and the
8 Court of Appeals when they finally made an analysis
9 of just that section of the case -- was there
10 probable cause predicated on the fact that this met
11 the profile.

12 In that same connection I think the language
13 in Schneckloth is very important. The Judge who
14 wrote the majority opinion in that case -- I forget
15 the name -- he started off by saying that any
16 search that is made without a search warrant is
17 per se, unconstitutional and he was right and what
18 was he talking about there? What the Court was
19 trying to tell us there in rather eloquent terms
20 was that the only way to get past this constitution
21 is to find an exception and when we talk about
22 making exceptions we are talking about breaking down
23 firm, important constitutional rights and the
24 court said that too. That's why I believe that if
25 our Court, even as presently constituted -- and I

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1 know it has leanings different from what we
2 traditionally expect -- even this Supreme Court --
3 because that is the same Supreme Court who is cited
4 and who put the language in *Schnecko v.*
5 *Bustamonte*. -- the Court made it clear we must have
6 something strong and powerful before we cut back on
7 constitutional rights and before we start off on
8 some notion that what that case said was out of
9 line with some of the reality we have to understand --
10 that the case was decided on a narrow set of circum-
11 stances, where a young fellow and a policeman in a
12 car -- Gonzales and the police officer -- and yes,
13 there was no question that Alpha, the young fellow
14 with the identification said "Yes. Go open the
15 trunk," and went to the ignition, removed the keys,
16 went to the trunk and they then found the counterfeit
17 checks. However, that is a far cry from this
18 situation.

19 Your Honor, I mention this only as an allusion
20 as to one of the comments of counsel; that a very
21 significant part of this is, that if there wasn't
22 probable cause was there consent?

23 If probable cause is not satisfied by the
24 profile requirement then I think the government has
25 a very difficult problem that they are going to have

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1 to deal with and I submit that if the language in
2 Ruiz-Estrella has any meaning at all it is very
3 clear.

4 This is what the Court said in paragraph 2:

5 "At the outset, we think it patent that the
6 seizure here was not predicated upon a showing of
7 probable cause -- indeed, the government does not
8 so contend. The government conceded at argument
9 that Ruiz-Estrella provided no one with any reason
10 to be suspicious of him at the airport; Falen so
11 testified during the suppression hearing. To be
12 sure, Ruiz-Estrella did fit the hijacking profile,
13 but no one contends that this statistical survey,
14 which Judge Weinstein in Lopez described as
15 identifying an armed individual about six percent
16 of the time" -- and they cited Lopez -- "can come
17 close to supplying traditional probable cause for
18 a search" and I think it is appropriate here and I
19 didn't realize until I just read it that when that
20 decision was being written they cited U. S. v.
21 Meulener. This is the Court of Appeals. I didn't
22 know they reached down to that level -- "Let me see
23 what a District Court Judge said."

24 (Continued next page.)
25

1 MR. WYATT: I think the cases are abundant. No
2 cases and no U.S. Attorney until now has argued that
3 meeting the profile has satisfied probable cause and
4 I don't think it does.

5 MR. LEVIN-EPSTEIN: Just one remark in response:

6 Mr. Wyatt might have been perfectly correct in
7 saying no U.S. Attorney has ever posited the argument
8 that the profile alone is not sufficient to raise
9 probable cause but I would go one step further and say
10 that no U.S. Attorney has yet offered that as the
11 ruling.

12 In fact, if I am not mistaken, what I said
13 was -- and I say it now -- that the position of the
14 Government in this case is not -- repeat -- not --
15 the profile alone was sufficient to raise probable
16 cause or reasonable suspicion -- or even whatever
17 the criterion may yet be, unarticulated as it has
18 been -- sufficient to search Mr. Williams.

19 On the contrary, there was more than the
20 profile. There was the profile plus that one factor
21 lacking in Ruiz-Estrella. There was a magnetometer
22 in this case. There was a magnetometer that had a
23 positive reaction and there was another reason to
24 inquire as to what was happening.

25 Now, even according to what Mr. Wyatt

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1 unintentionally but somewhat gratuitously has said,
2 the District Court in Lopez has said in a very, very
3 dispositive opinion the statistical breakdown
4 resulting in the profile, there are probably people
5 matching the profile who are not hijackers, who are
6 not carrying weapons, bombs or other contraband, but
7 that is why the profile in conjunction with the
8 magnetometer factor is so important and here we have
9 exactly that formula satisfied.

10 We have the profile and the reasoning of
11 Judge Weinstein satisfied here and in fact, the
12 reasoning of many Courts satisfied as to the profile.
13 But we have that plus the magnetometer.

14 The Court here -- your Honor was not given that
15 advantage in Ruiz-Estrella and the Court of Appeals so
16 denoted that. In fact, I believe there is a comment
17 in the Court of Appeals' decision in Ruiz-Estrella
18 that the Marshall himself was acting as a human
19 magnetometer and that was insufficient for a standard
20 to be satisfied as far as probable cause. Well, the
21 Government does not disagree with that. Hardly. How
22 could we?

23 As much as we find that our Marshalls are
24 astute and the officers of the law enforcement agencies
25 are perceptive, they can not do superhuman things --

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1 not yet. But they didn't have to in this case. All
2 Police Officer Huttick, then Deputy Marshall, had to
3 do was follow the procedure traditionally and legally
4 acceptable -- "Does this man fit the profile?" Does
5 this man match the standard under which we are
6 operating and which was given judicial sanction and
7 did he pass through the magnetometer and was there a
8 positive hit? Well, there was. That taken in
9 conjunction with the rationale, if not the specific
10 holding in Terry against Ohio gave him the duty and
11 the right to inquire as to the bag.

12 He testified that he patted the man down and
13 couldn't find anything. He also testified that when
14 he went through the magnetometer with the bag the
15 machine registered. It doesn't take any tremendous
16 deductive reasoning to determine that what was
17 registering on the magnetometer was in the bag.

18 Whether or not you believe Mr. Williams that
19 there was never a discussion of consent, the point
20 remains that based on that evidence alone there was
21 sufficient grounds under the unique circumstances of
22 an airport search for then Deputy Marshall Huttick to
23 inquire as to what was in that bag and he did and he
24 found a canister, which from all circumstantial
25 deductive reasoning, anyway, was the device that

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registered on that magnetometer.

You don't have the situation here that you had in Ruiz-Estrella. It is as simple as that. You have more. Based upon these criterion and not only on the facts suggested so ably by Mr. Wyatt as to the profile alone -- based on the totality of the circumstances the Government has sustained the burden of showing that the search under the Fourth Amendment was reasonable in this case.

THE COURT: I know there is one document in evidence -- the ticket. May I see that for a moment, please?

(Document handed to Court.)

THE COURT: There was testimony that this was purchased at 6:45 P.M. --

MR. LEVIN-EPSTEIN: I believe the reference to 6:45 was in response to early questioning of the witness on direct examination where I directed his attention to that time as to unusual circumstances. I don't believe there was testimony that that was when the ticket was purchased.

MR. WYATT: I don't believe so either.

THE COURT: There is no time on the ticket?

MR. WYATT: None that I could find.

MR. LEVIN-EPSTEIN: The witness has informed me,

1 if I may, sir -- well, I am mistaken, your Honor. There
2 is a stamp on the envelope which I thought would be a
3 time stamp, but it is merely a stamp indicating the
4 date.

5 THE COURT: Yes. That's all.

6 MR. LEVIN-EPSTEIN: But the fact that the
7 ticket was stamped on that date should be probative as
8 to the time.

9 The testimony is clear that the events, however
10 they transpired, happened approximately at 7:00 o'clock
11 in the morning. Midnight, September 24 and 7:00
12 o'clock in the morning -- we are clear from the stamp
13 that the ticket was purchased that day. I don't
14 believe there is any dispute as to that.

15 THE COURT: Well, the Court recognizes that
16 there has been some conflict in the testimony of the
17 two witnesses who have testified here on this
18 suppression hearing. The Court has therefore attempted
19 to determine whether facts do appear which are not
20 disputed. It may point the way to a determination as
21 to whether or not the search in question would fall
22 within the requirement of reasonableness in cases of
23 this type as they have been delineated in a considerable
24 number of opinions dealing with this special type of
25 search.

1 Apparently, the latest word on the subject in
2 this Circuit is U.S. against Albarado, decided
3 April 1, 1974 by a unanimous Court.

4 In reaching a decision in that case the Court
5 specifically declared that the decision there would
6 apply only to the search in the cases there involved
7 and to searches subsequent to the effective date of
8 this opinion.

9 The search in this case, there seems to be no
10 doubt, occurred on September 24, 1971, over a year
11 prior to the search described in the Albarado case
12 which took place in October, 1972.

13 The Court acknowledged in its opinion in
14 Albarado that the legality of searches of this type
15 has been many times contested and Courts had responded
16 differently and that our own Second Circuit has
17 demonstrated no unanimous point of view in its own
18 confrontations with the problem.

19 However, there is revealed and discussed in
20 the Albarado opinion certain information summing up
21 both the practice and the need for those practices,
22 adding, of course, that the practice has sprung from
23 what is referred to as the public outrage over air-
24 craft hijackings and a Governmental decision to
25 institute a program which would reassure air travelers

as to the safety of commercial air flights.

7
In this case there is, I believe, a very material difference between it and the situation in U.S. against Ruiz-Estrella which the defense has stressed in its argument against the validity of this search. That difference lies in the fact that here there was the use of a magnetometer which unquestionably -- strike unquestionably -- which it would be fair to infer reacted positively, at least once in this case and I mention that because I must also call attention to the fact that there appears to be no dispute that the defendant here met the profile devised as the first step to determining whether there was a potential hijacker on his way to board an airplane.

As the Government has pointed out -- and there doesn't seem to be any dispute in the evidence on this point -- after the first reaction of the magnetometer another element entered; namely, that the defendant was unable to produce any identification. Now, that was an element in the Ruiz-Estrella case but as you pointed out, Mr. Wyatt, the Court was not prepared to accept the human experience of a Marshall as a substitute for the technical and scientific accuracy of a machine such as the magnetometer, despite the

1 statistics regarding its performance and its propensity
2 to identify all types of metal that have no relation-
3 ship to what potential hijackers are supposed to be
4 attempting to carry aboard an aircraft.
5
6

7 (continued on next page)
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1 1 So, we do have here one, profile; two, magneto-
2 meter activation, at least one time and no identifica-
3 tion.

4 Now, I call attention to something else pointed
5 out in the Albarado case. The Court there states in
6 its slip opinion at page 2466 and I quote:

7 "The usual airport search consists of an
8 examination of the individual passenger and the opening
9 of carry-on luggage and a look at its contents."

10 The examination as it was made clear from what
11 followed referred to in Albarado, is, of course, the
12 initial examination made by a magnetometer and as I
13 have said the positive reaction indicated the presence
14 of metal, capable of triggering the magnetometer,
15 either on the person of the defendant or in the
16 carry-on bag that he had with him.

17 Now, in this Albarado case the Court also
18 pointed out with respect to the right to conduct a
19 frisk as well as a search of luggage, that if the
20 machine, and I quote starting with the word "machine"
21 at page 2478 of the slip opinion:

22 "Is activated again, the person has failed to
23 divest himself of all metallic items on his own. While
24 this in itself may not provide 'probable cause' or
25 even a reasonable suspicion in Terry terms, it

1 2 necessitates that further measure be taken. At this
2 point the only further practical measure is a pat-down
3 or frisk if necessary."

4 What I am pointing out is simply this: That
5 although it would appear that there was one, at least
6 one, activating of the magnetometer there is no question
7 based on the defendant's own testimony that he passed
8 through the magnetometer three times. He says two of
9 those times, after the first, were without the bag.
10 The Marshal says that two of those times -- meaning
11 the first and second -- were with the bag. I think
12 the fact that the defendant was directed by the airport
13 employee to go through a third time entitles the
14 Court to draw an inference that the Marshal's testimony
15 is supported about a second triggering of the magnet-
16 ometer with the bag, but even if that is not justifiable,
17 what I quoted earlier about the ordinary aircraft
18 practice of examination of a carry-on bag still suggests
19 to the Court that the search here fell within even the
20 latest discussions of the parameters of a reasonable
21 search as they have been outlined in the Albarado
22 search and for those reasons I am going to deny the
23 motion to suppress.

24 MR. WYATT: In view of the finding the Court
25 has made we would ask that findings of fact and

3 conclusions of law be prepared. We do intend to
2 appeal this decision.

3 I might advise the Court that despite the fact
4 that I spent the entire day researching the very latest
5 law in your district I was not aware of Albarado.

6 THE COURT: It has not appeared other than in
7 slip opinion form.

8 MR. WYATT: I checked the slip opinions also.

9 Despite the fact, it is my position that I don't
10 think the Court of Appeals in this district would find
11 Albarado applicable, as the Court said, to any search
12 that precedes that decision and I think the Court
13 said that for a particular reason -- because the Court
14 is aware of the wide range of positions that have
15 been taken in this district and not only this district
16 but throughout the United States. Missouri has an
17 entirely different position than those taken in
18 New York. Los Angeles takes a position that the
19 Court wouldn't even reach a serious question as to
20 the suppression of this evidence and for those reasons
21 we don't believe Albarado can be applied retroactively
22 simply because of the reasons stated in the opinion
23 and such as the Court stated; that Albarado is not
24 intended to have retroactive activity.

25 What the specifics are in that opinion, I don't

4 know because I haven't read it. What the particular
facts are in that case I am not familiar with them.
I don't know if there were suspicious movements or
unusual activity of the person who was the subject of
the investigation. I just don't know. But, I am
suggesting to the Court that I do not believe that
that case is intended to have retroactive activity
so on that basis I would ask that the Court grant us
a period of time in which to take the matter up to
the Court of Appeals, not only on the issues that we
have dealt with here but one thing that is conspicuously
absent from the Court's finding and analysis of the
case which is the question of consent and I gather
from that conspicuous absence that the Court has
concluded that the question of consent is either not
a significant question or it is not part of the
Court's determination. It seems kind of important to
me. It was important in every hijack case I have
read and I have read I think, all of the cases.

This case falls into the specialized situation
where the activity of the person gives rise to nothing
unusual to suspect that the person is doing anything
out of the ordinary aside from being just a passenger.
This person would fall within that six percent that
Judge Weinstein was talking about that could be caught.

1 5 First of all, we are suggesting the profile isn't
2 enough. Don't add the fact that he has no identifica-
3 tion. That is part of the profile. Don't add the
4 fact that he is alone with the ticket that is a one-
5 way ticket because again, that is the profile.

6 So, what I am suggesting to the Court is that
7 your Honor is taking each section of the profile and
8 making that something in addition to and that is not
9 so. By the way, I thought it was much more than that.
10 I expected to hear rather sophisticated and highly
11 unusual facts that would be the basis of the profile
12 but as I understand it, the profile means the person
13 has a one-way ticket; he is flying alone; has no
14 identification --

15 THE COURT: Bought the ticket for cash --

16 MR. WYATT: Bought the ticket for cash --
17 that's it. Other than that, I don't think there are
18 any other elements that constitute the profile.

19 THE COURT: I am not sure about the no-
20 identification, Mr. Wyatt. It is my recollection that
21 there were three elements and there was an age
22 element; that he fell between the age of 18 and 55.

23 MR. LEVIN-EPSTEIN: I believe it is part of
24 what Mr. Wyatt said and not -- the four basic criteria
25 as it has been explained and I understood it --

A 34
THE COURT: His sex --

MR. LEVIN-EPSTEIN: A male traveling alone on
a one-way ticket bought for cash.

THE COURT: And a certain age bracket.

MR. LEVIN-EPSTEIN: There was no such testi-
mony here.

THE COURT: I can see that the defendant appears
to be between the age of 18 and 55.

MR. LEVIN-EPSTEIN: And that he appeared that
way in 1971.

THE COURT: I don't assume that the identi-
fication was ever asked for because the profile
system, as I understand it, is simply a way of bringing
about any indication to the boarding area and at that
point, if the man passes through the magnetometer
successfully, he goes. If he activates the magnetomer,
then a request for identification would ensue to some
reassurance or some other way of satisfying the persons
at the boarding area.

(Continued on next page.)

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1 MR. LEVIN-EPSTEIN: I believe Mr. Wyatt and I
2 are guilty -- the Court is taking our vernacular for
3 the profile as synonymous with selectee.

4 According to Mr. Huttick's testimony, when
5 Mr. Williams appeared at the gate as a man traveling
6 along --

7 THE COURT: Yes, and the code appeared on the
8 ticket --

9 MR. LEVIN-EPSTEIN: That's right and the
10 Government can make the Court aware of how it
11 appeared -- then, when he tripped the magnetometer and
12 could not come forward with identification he then
13 matched the profile.

14 THE COURT: There are two points Mr. Wyatt
15 made, which I think certainly deserve some
16 discussion.

17 I do not believe that in making Albarado
18 prospective only in effect that the Court was intending
19 to announce a more relaxed rule but rather a more
20 strict rule concerning searches of this type.

21 That is to say, it took account of the fact
22 that up to that point there had been differences of
23 opinion; there had been some variety of procedures but
24 even in making the rule prospective only, it was not
25 ruling out the possibility that a search conducted in

1 1971 -- because you see, it^{A 36} applied only to searches
2 subsequent to the effective date of this opinion -- it
3 didn't mean to invalidate searches prior to the date of
4 the opinion if they, under all the circumstances, could
5 be held to be reasonable and so I don't believe that
6 the prospective effect of the opinion was intended to
7 apply a stricter rule to searches prior to the date of
8 the opinion.

9 Secondly, it is clear to the Court from the
10 Albarado opinion that the element of consent is not
11 regarded or the lack of consent, to use the Court's
12 phrase, is not necessarily fatal and I refer to
13 Page 2477 of the slip opinion -- when you have an
14 opportunity to see it -- and the Court states:

15 "It is unfortunate, but not necessarily fatal,
16 that there is not an explicit warning that the person
17 may avoid the frisk by not flying."

18 In other words, the Court does not accept the
19 view with which I am sure you are most familiar since
20 you come from California, namely, Judge Ferguson's
21 view, despite what was said in the Ruiz-Estrella
22 case on that subject, and the Court in Albarado goes on:

23 "As we view it, the legality of the search does
24 not rest on a 'consent' theory, but rather on the
25 reasonableness of the total circumstances, the fact

1 that a passenger may withdraw at any time plus the
2 general knowledge that one is subject to a search if
3 one flies is sufficient in light of the otherwise
4 minimized evasion of the passengers' privacy."

5 Now, in this case also, since you bring it up,
6 the Albarado case actually reversed a decision of the
7 Court in this District upholding a search, but it was
8 done largely on the basis that although the
9 magnetometer had been triggered there was no indication
10 first of all, that the man was designated -- the
11 passenger in this case was designated a selectee, but
12 on top of that, the Court points out he did place his
13 carry-on luggage on the table and it was presumably
14 searched.

15 He then passed through the magnetometer and
16 activated it and that led to the request to open his
17 jacket and permit a pat-down and there was revealed a
18 package wrapped in aluminum foil which had the size of
19 a dollar bill and was about a quarter of a inch thick;
20 obviously, not the kind of metallic object that would
21 be found to be a possible lethal weapon and I speak
22 not merely of a revolver, but something that could be
23 used to threaten passengers by saying it was a bomb
24 and the Court in Albarado turns to that situation at
25 Page 2480 of the slip opinion stating that:

1 "In view of our determination that the frisk
2 of Appellant was unlawful, we need not reach the
3 question whether the officer's opening of the aluminum
4 foil would have been lawful."

5 It goes on to say:

6 "It might be said that inasmuch as the officer
7 is only looking for the item which activated the
8 magnetometer, he could not open a container, which he
9 knew upon feel could not contain the offending metal."

10 Then, the Court said, and I think this is
11 significant:

12 "This is not to say, however, that an officer
13 may never investigate something which is not metallic.
14 Hijackers as well as airport officers know of the
15 existence of plastic explosives or even ordinary
16 dynamite. If an officer comes lawfully upon a container
17 which may conceal such items, he may require that they
18 be opened to his inspection before the passenger is
19 allowed to proceed on board with the container. In
20 Kroll, the Eighth Circuit quoted with approval the
21 statement of the District Court that a search would be
22 permissible" -- and they quote from that case -- "of
23 that which may reasonably be deemed to conceal a
24 weapon or explosives. Reasonableness, in this context,
25 is a matter of probabilities."

A 39

1 So, it seems to me that largely on the basis of
2 the Court's discussion on Albarado, a decision is
3 warranted that here, upon the triggering of the
4 magnetometer, which the Court finds to be twice --
5 with the bag and another time without -- permitted a
6 search of the bag and an examination of the container
7 and the other objects which were in the bag which
8 apparently, as far as the other evidence shows, were
9 the only other objects in the bag -- a small zippered
10 carry-on typical flight bag, as they call it, and for
11 that reason, since you raise those points, I note those
12 as part of my decision, believing that this search, in
13 the totality of the circumstances was a reasonable
14 search and that the pat-down of the defendant at the
15 time was reasonable regardless of whether or not he
16 was notified of any right to turn around, let's say
17 and go back.

18 Now, I am cognizant of the prove in the case
19 that the defendant indicated a desire to return and
20 get identification. For purposes of this case, I do
21 not find that credible. The defendant paid substan-
22 tial money in cash for this ticket. He was obviously
23 intent on taking that flight. I believe his very
24 proceeding to the gate was with the intention of
25 boarding the plane if he could and under the

A 40

1 circumstances I believe all the elements which have
2 been discussed here satisfy the criteria for the
3 legality of the search.

4 Now, you mentioned earlier, about the possibil-
5 ity of taking an appeal and requiring findings and
6 conclusions.

7 I would be perfectly willing to have the
8 Government and Mr. Wyatt too, submit proposed findings
9 and conclusions to the Court, but with respect to the
10 question of appeal, however, I am not at all certain
11 that it is permissible except under a rather unusual
12 procedure we have here. I don't know the rule in your
13 Circuit --

14 MR. LEVIN-EPSTEIN: If I may assist the Court:
15 one way to allow for the perfection of an appeal would
16 be to follow through what Mr. Wyatt and I discussed
17 earlier and execute at this time an order prepared by
18 the Government in which -- if I may read it to the
19 Court:

20 Waiver of jury trial, 72 CR 3, United States of
21 America, plaintiff v Mozelle Williams, defendant.

22 It is hereby stipulated to, consented to, and
23 agreed by the defendant and the United States of
24 America that the above entitled case charging a viola-
25 tion of Title 21 U.S. Code Section 841 (a) (1) be tried

A 41

1 by the Court without a Jury and the defendant,
2 Mozelle Williams, herein being advised of his right to
3 a trial by jury waives his right in open Court to a
4 trial by jury --

5 And I have dated the order: Brooklyn, New York,
6 May 29, 1974.

7 I have an original of the order executed by me
8 on behalf of the newly-inducted United States Attorney,
9 Mr. Trager. It awaits only Mr. Williams' signature,
10 having already been executed by Benjamin Wyatt,
11 attorney for the defendant.

12 THE COURT: Has Mr. Trager approved that?

13 MR. LEVIN-EPSTEIN: I can't say he has
14 personally approved this, but I have taken the liberty
15 of continuing the policy of the office under previous
16 administrations, yourself included, but if you would
17 prefer I can have Mr. Trager approve this personally
18 on this rather unusual day.

19 THE COURT: I feel Mr. Trager should have an
20 opportunity to consider it.

21 MR. LEVIN-EPSTEIN: I will submit it to him
22 forthwith.

23 THE COURT: Time is running, isn't it?

24 Are you planning to get back to California?

25 MR. WYATT: Yes; tonight, as a matter of fact.

A 42

1 THE COURT: Fortunately, you arrive there much
2 earlier than here.

3 MR. WYATT: Yes.

4 MR. LEVIN-EPSTEIN: Although I can not speak
5 with 100 per cent certainty in this matter, I do not
6 believe that Mr. Trager will depart from the practice
7 of the United States Attorney's Office.

8 THE COURT: I'd like Mr. Trager to tell you
9 that.

10 MR. LEVIN-EPSTEIN: Very well.

11 How about if I leave the Court now and try and
12 see if Mr. Trager is still here and come right back?

13 THE COURT: What remains to be done?

14 MR. LEVIN-EPSTEIN: Mr. Williams' signature and
15 your Honor's.

16 THE COURT: Why not obtain Mr. Williams'
17 signature?

18 MR. WYATT: Sure. We can do that right now so
19 there will be no necessity for his return, but it will
20 be subject to the understanding, since the new United
21 States Attorney was really only sworn in today, that
22 he be given an opportunity --

23 MR. LEVIN-EPSTEIN: Am I correct in assuming --

24 THE COURT: I will withhold my signature until
25 I hear from him.

A 43

IG:jm
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1 MR. LEVIN-EPSTEIN: Would you desire that
2 Mr. Trager initial my signature in conjunction with
3 his own?

4 THE COURT: No.

5 I might suggest incidentally, that you may want
6 to have the reporter transcribe my comments on the
7 matter --

8 MR. WYATT: That would be helpful --

9 THE COURT: -- (continuing) -- so that Mr. Trager
10 would really have something to look at.

11 MR. LEVIN-EPSTEIN: We have already asked for
12 daily copy.

13 MR. WYATT: We would ask for a copy and we
14 advise the Court at this time that because of
15 Mr. Williams' indigent situation, not being able to
16 work while this case is pending, he has no funds to
17 pay for a copy of the transcript and we had not really
18 anticipated the need. However, since this April, 1974
19 case came on us unexpectedly, we might say -- he has
20 sold all the assets he has as far as I know.

21 THE COURT: In the interest of justice here,
22 even though there has not been filed the necessary
23 affidavit, while you are doing it, Miss Ginsberg, please
24 make an extra copy for Mr. Wyatt and we will settle the
25 question later on who is to pay for it.

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1 MR. LEVIN-EPSTEIN: May I offer the proposed
2 stipulation and waiver of jury trial for the Court's
3 consideration and have it marked if the Court desires.

4 I can show Mr. Trager a Xerox copy.

5 THE CLERK: It is a stipulation that the Judge
6 has to sign.

7 MR. LEVIN-EPSTEIN: But, your Honor can with-
8 hold the signature.

9 THE COURT: Yes. You just hold it and then it
10 can be submitted to the Court and I will certainly
11 accept your statement that Mr. Trager agrees it should
12 be done.

13 MR. LEVIN-EPSTEIN: Very well, your Honor.

14 THE CLERK: May I give Mr. Wyatt the affidavit?

15 THE COURT: Yes, why don't you do that.

16 THE CLERK: This is the affidavit you have to
17 sign.

18 THE COURT: Do I understand that if this
19 arrangement is approved the next step would be an
20 appeal, not a trial?

21 MR. WYATT: Correct. That is what I anticipate.

22 MR. LEVIN-EPSTEIN: That is up to Mr. Wyatt.

23 THE COURT: Is that correct?

24 MR. WYATT: Yes.

25 THE COURT: So, we are not concerned with fixing

1 a trial date.

2 MR. WYATT: No.

3 THE COURT: I call your attention to the fact
4 that I am heavily booked for the month of June --

5 MR. WYATT: As I am, your Honor.

6 THE COURT: I hope to be out of business in
7 July.

8 MR. WYATT: Well, I can get the notice of appeal
9 filed.

10 THE COURT: There is a ten day requirement.

11 MR. WYATT: Yes. That is satisfactory.

12 THE COURT: That is just to file the notice of
13 appeal.

14 MR. WYATT: Yes, we will.

15 THE COURT: I am assuming we will get an answer
16 "Yes or No" and if perchance Mr. Trager says "No",
17 where does that leave us?

18 MR. LEVIN-EPSTEIN: Then I will prepare a new
19 order for his own signature and send it to Mr. Wyatt
20 by the most expedient available means.

21 THE COURT: I think that is all we can do at
22 the present time.

23
24
25 * * * * *

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EXHIBITS

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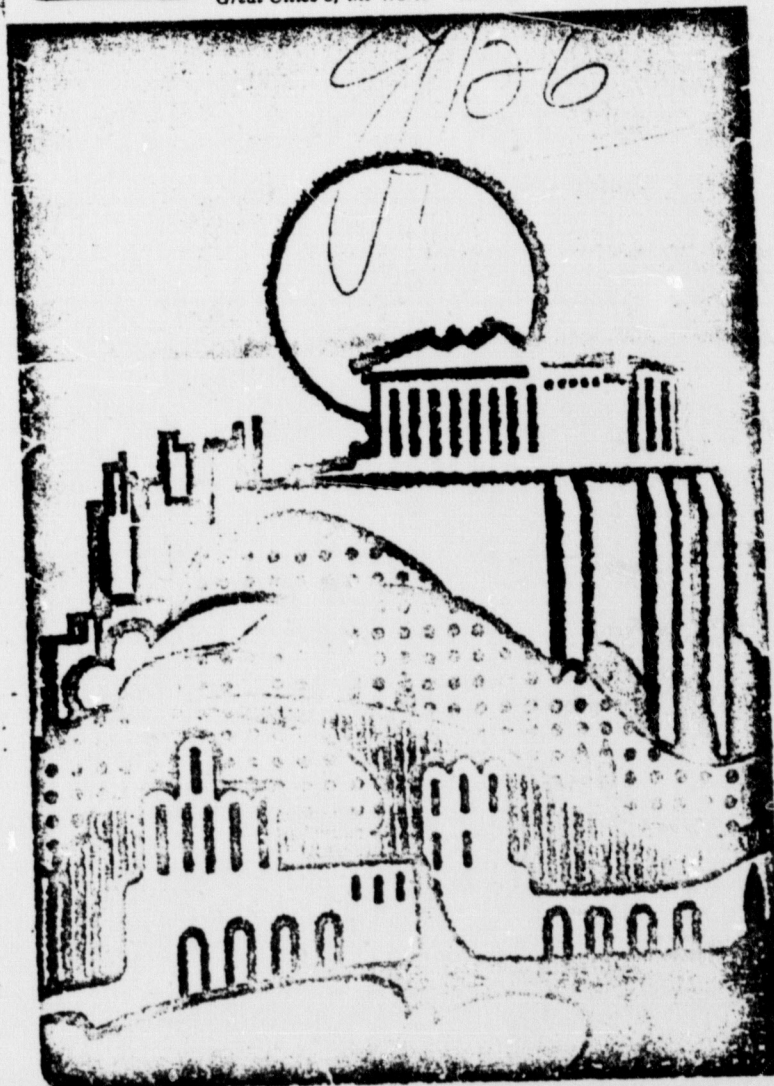
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DEFENDANT'S
EXHIBIT
J. H. [unclear]
5-29-74
[unclear]
PENNS. - BOSTON, N.J.



"Great Cities of the World" - Athens



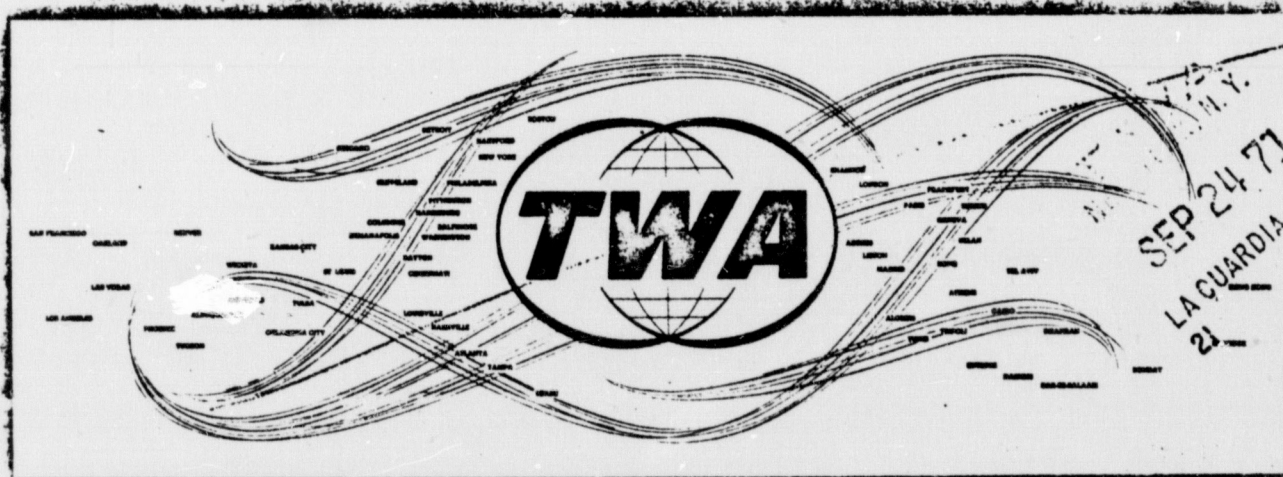
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1 FLIGHT

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A 49

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SUBJECT TO CONDITIONS OF CONTRACT LAM PASSENGER'S COUPON										015:12		4:024:970											
FLIGHT COUPON NO. 1																							
NAME OF PASSENGER <i>M. M. Williams</i>				NOT TRANSFERABLE				DATE OF ISSUE 24 SEP 71															
PORT OF ORIGIN				DESTINATION				ISSUED IN EXCHANGE FOR															
NOT VALID BEFORE				TICKET DESIGNATION/FARE CODE				DATE AND PLACE OF ORIGINAL ISSUE															
NOT VALID AFTER																							
X/Q! GOOD FOR PASSAGE BETWEEN PORTS OUTLINED										FARE BASIS		CARRIER		FUEL/CLASS		DATE		TIME		STATUS		ALLOW	
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IT IS UNLAWFUL TO PERCHASE OR RESALE THIS TICKET
FROM ANY OTHER SOURCE THAN TRANS WORLD AIRLINES
OR ITS AUTHORIZED TRAVEL AGENT

A 50

ISSUED BY TRANS WORLD AIRLINES, INC.				PASSENGER TICKET AND BAGGAGE CHECK				FOR DELAND OFFICE ONLY				AIRLINE FORM		SERIAL NUMBER	
NAME OF PASSENGER				NOT TRANSFERABLE				SUBJECT TO CONDITIONS OF CONTRACT ON PASSENGER'S COUPON				CARRIER		FARE CALCULATION	
ENDORSEMENTS				DATE OF ISSUE				ISSUED IN EXCHANGE FOR				DATE AND PLACE OF ORIGINAL ISSUE		DATE AND PLACE OF ISSUE	
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

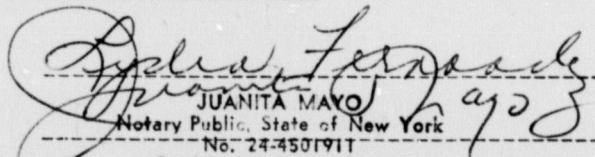
-----LYDIA FERNANDEZ-----, being duly sworn, says that on the 24th
day of February, 1975, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, & Government's Appendix
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Martin H. Kinney, Esq.

500 West Lincoln Highway

Merrillville, Indiana 46410

Sworn to before me this
24th day of Feb. 1975


JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County
Commission Expires March 30, 1975

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the _____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

United States Attorney,
Attorney for _____
To: _____

Attorney for _____
=====

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the _____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

United States Attorney,
Attorney for _____
To: _____

Attorney for _____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____ is hereby admitted.

Dated: _____, 19____

Attorney for _____